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No. 02-1624

In The

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent,

Petitioners,

v.

MICHAEL A. NEWDOW, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center" or "*Amicus*") is a non-partisan, non-profit organization with the

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free speech and press rights, privacy rights, property rights, equal protection rights, due process rights, and the freedoms of association and religion. Of particular importance to the Center in this case is the freedom of religion protected by the First Amendment, which is wholly consistent with patriotic, ceremonial, and historical acknowledgements of God and religion in the public sphere, including the public schools.

SUMMARY OF ARGUMENT

On June 26, 2002, a panel decision issued by two judges of the U.S. Court of Appeals for the Ninth Circuit shocked the constitutional conscience and common sense of the country by holding that a public school district policy of daily voluntary recitation of the official Pledge of Allegiance "impermissibly coerce[d] a religious act" and was therefore "unconstitutional" because it "violate[d] the Establishment Clause." The two-judge majority reached its conclusion by focusing on the inclusion of the phrase "one Nation under God" in the Pledge, and by reasoning that such a statement "is a profession of religious belief." Nothing could be further from the constitutional truth.

As this Court has held on numerous occasions, the First Amendment's prohibition against laws establishing religion does not mandate such a complete separation of church and state that the government must eradicate all references to God and religion from the public sphere. Rather, this Court's precedents teach that acknowledgements of our shared religious heritage and culture are wholly consistent with the Constitution because we are a religious people whose history cannot be separated from that of religion.

In the context of the public schools, this Court's Establishment Clause jurisprudence has carefully and consistently erected a boundary between the constitutionally permissible recognition of God and religion in patriotic activities, ceremonial occasions, and historical instruction and the constitutionally impermissible practice of subjecting schoolchildren to religious exercises and practices. Despite the clarity and continuity of this distinction, the decision of the two-judge majority below disregarded this Court's precedents in declaring the voluntary recitation of the Pledge unconstitutional. In doing so, the two judges defiantly disregarded this Court's exceptionally uniform and unequivocal pronouncements that the Pledge and its voluntary recitation are wholly consistent with the First Amendment. The two judges also plainly erred by mistakenly focusing solely on the inclusion of the phrase "one Nation under God" while, at the same time, misreading the entirety of the Pledge, all in order to erroneously conclude that both the purpose and effect of reciting the Pledge was an improper religious one. Neither the Pledge nor its recitation constitutes a forbidden religious exercise because pledging allegiance is, by its very nature, purpose, and effect, a secular activity—an individual statement of patriotism and respect for this country and its primary symbol. Because the decision below held to the contrary, it must be reversed.

ARGUMENT

For the past half century, a countless number of people of all ages have "pledge[d] allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for

all."[2] They have done so patriotically, respectfully, solemnly, voluntarily, and, according to the opinions of this Court and its Justices, constitutionally. Recitation of the Pledge is forced upon no one.

Nevertheless, despite clear pronouncements from this Court uniformly and unequivocally upholding the constitutionality of our official Pledge of Allegiance, two judges sitting on a panel of the U.S. Court of Appeals for the Ninth Circuit held that a public school district policy[3] providing for the voluntary recitation[4] of the Pledge at the

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[2] 4 U.S.C. § 4 (2003) ("The Pledge of Allegiance to the Flag: 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.'").

[3] The policy of the Elk Grove Unified School District states: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day." ELK GROVE UNIFIED SCHOOL DISTRICT POLICY AR 6115. The policy was promulgated to implement a California education law that states: "In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." CAL. EDUC. CODE § 52720 (Deering 2003).

[4] This Court held that the public schools cannot compel schoolchildren to recite the Pledge of Allegiance in *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("the action of the local authorities in compelling the . . . pledge transcends constitutional limitations"). However, in the case at bar, Respondent "does not allege" that the Elk Grove Unified School District "requires his daughter to participate in reciting the Pledge." *Newdow v. U.S. Congress*, 328 F.3d 466, 483 (9th Cir. filed June 26, 2002, amended Feb. 28, 2003), *cert. granted sub nom., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (Oct. 14, 2003). Rather, Respondent complains that the Establishment Clause is violated when his daughter is forced to "'watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming

beginning of each school day "impermissibly coerce[d] a religious act." *Newdow v. U.S. Congress*, 328 F.3d 466, 487 (9th Cir. filed June 26, 2002, amended Feb. 28, 2003), *cert. granted sub nom., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (Oct. 14, 2003). Based upon that flawed conclusion, the two-judge majority held that "the school district's policy and practice . . . violate[d] the Establishment Clause," *id.* at 490, and implicitly decided that the inclusion of the phrase "one Nation under God" made the Pledge itself constitutionally infirm, *see id.* at 487-88.

Both of these judgments were "wrong, very wrong," in the words of Judge Diarmuid O'Scannlain, who dissented from the denial of rehearing the case *en banc*. *Newdow v. U.S. Congress*, No. 00-16423, 2003 U.S. App. LEXIS 3665, at *12 (9th Cir. Feb. 28, 2003) (O'Scannlain, J., dissenting from the denial of rehearing *en banc*). "[W]rong because reciting the Pledge of Allegiance is simply not 'a religious act' as the two-judge majority asserts, wrong as a matter of [this] Court['s] precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense." *Id.*

While there is much to criticize about the reasoning and judgment of the decision below, *Amicus* submits that the ruling's fundamental flaw is the two-judge majority's unsupported assumption that voluntary recitation of the Pledge, including the phrase "one Nation under God," by children in the public schools constitutes a religious exercise forbidden by the Establishment Clause. *Newdow*, 328 F.3d at 487 (assuming that voluntary recitation of the Pledge constitutes "a religious act" and "a profession of religious belief").

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that there is a God, and that our's [sic] is "one [N]ation under God."'" *Id.* at 483 (quoting Compl. ¶ 79).

The Pledge is most certainly a powerful expression of patriotism and respect for this country and its primary symbol. But, as explained in numerous opinions of this Court and its Justices, neither the Pledge itself nor its voluntary recitation constitutes a religious exercise proscribed by the First Amendment's prohibition against "law[s] respecting an establishment of religion."[5] Rather, the nature, purpose, and effect of the Pledge and its voluntary recitation are secular, and this Court should reverse the decision below as being the very essence of a "relentless and all-pervasive attempt to exclude religion from every aspect of public life" that itself is "inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

I. THE ESTABLISHMENT CLAUSE DOES NOT ERECT A WALL OF COMPLETE SEPARATION BETWEEN CHURCH AND STATE

In deciding cases brought to vindicate the constitutional principle guaranteed by the Establishment Clause, this Court has sometimes colloquially referred to the First Amendment "as erecting a 'wall [of separation]' between church and state." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citing *Everson v. Bd. of Educ.* 330 U.S. 1, 18 (1947)). At the same time, however, this Court "has recognized that 'total separation is not possible in an absolute sense.'" *Lynch*, 465 U.S. at 672 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)). Indeed, it "has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). "Nor does the Constitution require complete separation of church and state." *Lynch*, 465 U.S. at 673.

[5] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

As this Court has recognized, "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), and the "history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962). For these reasons, this Court has upheld the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life" as being wholly consistent with the Establishment Clause, *Lynch*, 465 U.S. at 674, on the grounds that it is "abundantly clear . . . that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is . . . constitutionally invalid,'" *id.* at 683 (quoting *Nyquist*, 413 U.S. at 771). As stated by this Court more than a half century ago: "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter." *Zorach*, 343 U.S. at 312.

Thus, in every Establishment Clause case, this Court "must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that . . . total separation of the two is not possible." *Lynch*, 465 U.S. at 672. "The problem, like many problems in constitutional law, is one of degree," *Zorach*, 343 U.S. at 314, and "[r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—th[is] Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678. As a result, this Court's

"precedents plainly contemplate that on occasion some advancement of religion will result from governmental action," *id.* at 683, because the Establishment Clause does not erect a high and impenetrable wall, but rather "a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship,'" *id.* at 679 (quoting *Lemon*, 403 U.S. at 614).

II. THE ESTABLISHMENT CLAUSE DRAWS A DISTINCTION BETWEEN PROHIBITED RELIGIOUS EXERCISES SPONSORED BY THE PUBLIC SCHOOLS AND PERMISSIBLE PATRIOTIC ACKNOWLEDGEMENTS OF GOD AND RELIGION

In the context of the public schools, this Court has carefully and consistently erected the barrier imposed by the Establishment Clause by drawing a distinction between the permissible secular acknowledgement of our nation's religious history, character, and culture, on the one hand, and the impermissible non-secular sponsorship of religious exercises and practices, on the other. *See, e.g., Engel*, 370 U.S. at 424-25, 435 n.21 (noting the difference between the classroom recitation of the Regents' prayer, held to be an impermissible "religious activity," and the recitation of historical documents and singing of officially espoused anthems which refer to God or religion, held to "bear no true resemblance to the unquestioned religious exercise" of the Regents' prayer). Culminating in *Lee v. Weisman*, 505 U.S. 577 (1992), this Court has clearly articulated this constitutional boundary by holding that "the Constitution guarantees that government may not coerce anyone to support or participate in *religion or its exercise*," *id.* at 587 (emphasis added), a principle that has run continuously through this Court's school prayer precedents for the past four decades. Thus, in cases from *Engel v. Vitale*, 370 U.S. 421 (1962), to *School Dist. of Abington Township v.*

Schempp, 374 U.S. 203 (1963), to *Wallace v. Jaffree*, 472 U.S. 38 (1985), to *Lee v. Weisman*, 505 U.S. 577 (1992), to *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this Court has consistently held that the constitutionally dispositive factor in determining whether a public school district has violated the Establishment Clause turns on whether challenged policy or practice sponsors or directs an activity that constitutes, by its very nature, purpose, and effect, a religious act or exercise. *See Santa Fe Indep. Sch. Dist.*, 505 U.S. at 307-17 (policy of pre-football game prayers declared unconstitutional because "the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer"); *Lee*, 505 U.S. at 586-98 (policy of prayer at graduation declared unconstitutional because it constituted a "state-sponsored and state-directed religious exercise in a public school"); *Wallace*, 472 U.S. at 57-60 (statute authorizing a one-minute moment of silence in the public schools "for meditation or voluntary prayer" declared unconstitutional because its purpose and effect was "endorsement and promotion of . . . [the] particular religious practice" of prayer); *Schempp*, 374 U.S. at 223-25 (laws requiring readings from the Bible at the beginning of each school day declared unconstitutional because their purpose and effect was to "require religious exercises" in the public schools); *Engel*, 370 U.S. at 424-30 (policy of daily recitation of the Regents' prayer declared unconstitutional because it constituted a "program of governmentally sponsored religious activity").

This Court's most thorough explanation of this Establishment Clause distinction was set forth in *Engel v. Vitale*, 370 U.S. 421 (1962), in which this Court invalidated a school district's policy adopting the daily recitation of the Regents' prayer.[6] *Id.* at 422. This Court described the

[6] The Regents' prayer stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents,

Regents' prayer as "a solemn avowal of divine faith and supplication for the blessings of the Almighty" and stated that the "nature of such a prayer has always been religious." *Id.* at 424-25. For these reasons, this Court held that "New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer" constituted "a religious activity" that was "inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself." *Id.* at 424, 433.

At the same time, however, this Court took note of the constitutional distinction between the unconstitutional Regent's prayer and other patriotic, ceremonial, and historical references to God and religion that are wholly consistent with the Establishment Clause. The Court stated:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [the Regents' prayer] that the State of New York has sponsored in this instance.

Id. at 435 n.21.

Such is the dispositive constitutional distinction that has driven this Court's Establishment Clause jurisprudence, at

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our teachers and our Country." *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

least in the context of the public schools, for more than the past forty years. And, good evidence of this fact are the decisions of this Court in cases such as *Lee v. Weisman*, 505 U.S. 577 (1992), and *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). In those cases, this Court invalidated public school activities that were undeniably religious in their nature, purpose, and effect, such as prayers at graduation ceremonies, *see Lee*, 505 U.S. at 581-84, 586-87, and daily classroom Bible readings and recitation of the Lord's Prayer, *see Schempp*, 207-08, 223-24, while leaving intact the Pledge of Allegiance, with its reference to "one Nation under God," which was also an integral part of the activities challenged in those cases. *See Lee*, 505 U.S. at 583 (describing the graduation exercises by stating that "students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers"); *Schempp*, 374 U.S. at 207-08 (describing the opening exercises by stating they included "Bible reading . . . followed by a standing recitation of the Lord's Prayer, together with the Pledge of Allegiance to the Flag"). The failure of the two judges below to recognize and abide by this touchstone Establishment Clause distinction condemns the entirety of their decision.

III. VOLUNTARY RECITATION OF THE PLEDGE OF ALLEGIANCE IS NOT A RELIGIOUS EXERCISE PROHIBITED BY THE ESTABLISHMENT CLAUSE

Instead of recognizing the distinction drawn by this Court between constitutional patriotic, ceremonial, and historical references to the Divine and the unconstitutional sponsorship of religious acts and exercises, the decision of the two-judge majority below focuses solely on the inclusion of the phrase "one Nation under God" in the Pledge and then assumes that such a reference transforms the patriotic exercise into a forbidden "religious act." *Newdow*, 328 F.3d at 487. Such reasoning is fundamentally flawed. It fails to faithfully

follow the exceptionally unequivocal and uniform opinions of this Court and its Justices approving of the Pledge and its voluntary recitation as wholly consistent with the Establishment Clause. It mistakenly focuses solely on an historical reference to God, as opposed to the totality of the Pledge, in order to obfuscate its true patriotic purpose. And, it erroneously concludes that the effect of voluntary recitation of the Pledge is "a profession of religious belief" by misreading the Pledge itself. *Id.* For these reasons, the judgment below is in error.

A. The Opinions of this Court and its Justices Hold that Voluntary Recitation of the Pledge of Allegiance Is Consistent With the Establishment Clause

In assuming that the school district's policy of daily voluntary recitation of the Pledge "impermissibly coerce[d] a religious act," *id.*, the decision of the two-judge majority below flagrantly disregarded the opinions of this Court and its Justices to the contrary. Specifically, the two judges who made up the majority below dismissed those pronouncements as nothing more than mere "dicta . . . not inconsistent" with their own declaration that "the school district's policy and practice of teacher-led recitation of the Pledge . . . violate[d] the Establishment Clause." *Id.* at 489, 490. Nothing could be further from the constitutional truth.

On two separate occasions, this Court, in the context of Establishment Clause challenges, has upheld the constitutionality of the Pledge and its voluntary recitation. *See Lynch*, 465 U.S. at 674-78 (citing the constitutionality of the Pledge in the context of an Establishment Clause challenge to a holiday display including a creche); *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1981) (same, except the challenge was to a creche and a menorah).

Specifically, this Court has held that the "reference to our religious heritage . . . found in the statutorily prescribed . . . language '[o]ne [N]ation under God,' as part of the Pledge of Allegiance to the American flag" does not "establish[ ] a religion or religious faith, or tend[ ] to do so," while, at the same time, recognizing that the "[P]ledge is recited by many thousands of public school children—and adults—every year." *Lynch*, 465 U.S. at 676, 678 (citations omitted).[7]

Five years later, this Court again upheld the Pledge as wholly "consistent with the proposition that government may not communicate an endorsement of religious belief," noting that "there is an obvious distinction between creche displays," one of which this Court found to violate the Establishment Clause in *County of Allegheny*, "and references to God in the [M]otto and the [P]ledge." *County of Allegheny*, 492 U.S. at 602-03 (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring), and 465 U.S. at 716-17 (Brennan, J., dissenting) (demonstrating that the *Lynch* Court was unanimous in its opinion that the Pledge and its voluntary recitation were consistent with the Establishment Clause)).

These pronouncements are not mere dicta, rather, they comprise part of the "well-established rationale upon which th[is] Court based the results of its earlier decisions." *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996). As such, the two-judge majority below was not free to disregard those precedents, but, instead, was bound to follow them because, "[w]hen an opinion issues for th[is] Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court and the inferior courts] are bound." *Id.* at 67.

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[7] At the same time, this Court upheld the constitutionality of "the statutorily prescribed national motto 'In God We Trust,' which Congress and the President mandated for our currency." *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (citations omitted).

Moreover, the fact that this Court and its individual Justices "have grounded [their] decisions in the oft-repeated understanding," *id.* at 67, that the voluntary recitation of the Pledge does not violate the First Amendment has created more than just binding precedent. *See Newdow*, No. 00-16423, 2003 U.S. App. LEXIS 3665, at *36-*37 (O'Scannlain, J., dissenting from the denial of rehearing *en banc*) (citing the numerous opinions from this Court and its Justices that "contain explicit references to the constitutionality of the Pledge"); *see also* Pet. at 17-19, *United States v. Newdow*, No. 02-1574 (filed Apr. 30, 2003), *cert. denied*, 124 S. Ct. 383 (Oct. 14, 2003) (citing the "opinions of individual Justices" that "have cemented as common ground the proposition that the Pledge of Allegiance" is "constitutionally permissible").

These exceptionally unequivocal and uniform opinions, joined in by at least twelve Justices of this Court over a period of more than four decades, establish the Pledge, including the phrase "one Nation under God," as a fixed constitutional signpost demarking a limit in this Court's Establishment Clause jurisprudence. In other words, whatever other public actions may offend the First Amendment's prohibition against "law[s] respecting an establishment of religion," U.S. CONST. amend. I, this Court has consistently and categorically pointed to the voluntary recitation of the Pledge as the most ubiquitous example of what the Establishment Clause certainly permits—the "public acknowledgement of [this country's] religious heritage long officially recognized by the three constitutional branches of government." *Lynch*, 465 U.S. at 686. Because the two judges below failed to observe this Establishment Clause signpost while discounting this Court's precedents upholding the voluntary recitation of the Pledge, their decision must be reversed.

B. The Purpose of Voluntary Recitation of the Pledge of Allegiance Is Secular

The decision of the two-judge majority below also plainly erred in concluding that the voluntary recitation of the Pledge by children in the public schools served an impermissible religious purpose. In reaching this erroneous conclusion, the two judges focused solely on the inclusion of the words "under God," and held that the purpose of the "school district's practice" was "to inculcate in students a respect for . . . the religious values [the Pledge] incorporates." *Newdow*, 328 F.3d at 487. Such reasoning not only flaunts this Court's admonition not to focus exclusively on the religious component of any activity challenged under the Establishment Clause because such a fixation would lead to a self-fulfilling finding of impermissible religious purpose, but also wholly ignores the true purpose of reciting the Pledge in the first place—namely, an individual expression of patriotism and respect for this country and its primary symbol. Because the school district's policy of reciting the Pledge was adopted in order to advance such a permissible secular purpose, patriotism, the judgment below cannot stand.

It is true that this Court "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. Indeed, this Court has previously noted the impropriety of "[f]ocus[ing] exclusively on the religious component of any [challenged] activity" when determining whether it advances a constitutionally permissible secular purpose because dwelling exclusively on the religious component "would inevitably lead to [the activity's] invalidation under the Establishment Clause." *Id.* For this reason, a challenged activity must always be considered as a whole and in its

proper context for the constitutional analysis. *See id.* at 679-80 (lower court "plainly erred by focusing almost exclusively on the creche" when its constitutionality should have been considered "in the proper context of the Christmas Holiday season"); *see also County of Allegheny*, 492 U.S. at 616-20 (upholding a combined holiday display of a Christmas tree, sign saluting liberty, and a menorah by examining the purpose of the display as a whole).

Despite these teachings, the two-judge majority below did not look at the context and totality of voluntary recitation of the Pledge in deciding that it advanced the impermissible religious purpose of "enforc[ing] a 'religious orthodoxy' of monotheism." *Newdow*, 328 F.3d at 488. If the court below had done so, it would have surely found that the Pledge's true, primary, and predominant purpose is, and always has been, a permissible secular one—patriotism. After all, not only are those who recite the Pledge swearing allegiance to and showing respect for this country and its primary symbol, but the very state statute, under which the school district's policy was adopted, provides for "appropriate *patriotic* exercises." CAL. EDUC. CODE § 52720 (Deering 2003) (emphasis added). In fact, the California law explicitly states that the "giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements" that, "[i]n every public elementary school . . . , there shall be conducted appropriate *patriotic* exercises." *Id.* (emphasis added). Thus, on its very face, the statute states that the purpose of voluntary recitation of the Pledge in the public schools is the permissible one of patriotism, not the impermissible establishment of religion.

The decision of the two-judge majority below attempts to obfuscate the explicit and obvious patriotic purpose of the Pledge by focusing on the addition of the words "under God." But the fact that Congress added that historical religious acknowledgement in 1954 does not change the

constitutional analysis. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the city government had likewise added a menorah to its own pre-existing winter season holiday display. *See id.* at 581-82. Nevertheless, despite the later addition of, what was described as, a "religious symbol," *id.* at 613, this Court still focused its constitutional inquiry as to the purpose of the combined holiday display on the display as a whole, rather than on each component as it was added in sequence. *See id.* at 616-20. Even more to the point, at least one Justice of this Court has explained that the later addition of the words "under God" to the Pledge do nothing to undermine its permissible secular purpose of patriotism or consistency with the Establishment Clause because those words "serve as an acknowledgement of religion with 'the legitimate secular purpose of solemnizing public occasions, [and] expressing confidence in the future.'" *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)). Because the two-judge majority below held to the contrary, its decision was in error.

C. The Effect of Voluntary Recitation of the Pledge of Allegiance Is Secular

Finally, the decision of the two-judge majority below erroneously concluded that effect of voluntary recitation of the Pledge in the public schools was to engage in a forbidden "profession of religious belief, namely, a belief in monotheism." *Newdow*, 328 F.3d at 487. To arrive at this conclusion, the two judges reasoned that the recitation of the Pledge "is a performative statement" acting as an "affirmation by the person reciting it," *id.* at 489, and that the inclusion of the words "under God" had the effect of "inculcat[ing] in students . . . the religious values [that the Pledge] incorporates," *id.* at 487. In other words, according to the two judges, the statement "one Nation under God" was

"identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion." *Id.* And, as a result, to "recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and . . . monotheism." *Id.* With all due respect to their decision, in so holding, the two judges simply misread the Pledge and to what its adherents swear their allegiance.

When individuals recite the Pledge, they are not swearing an allegiance to God. Rather, according to its precise text, they "pledge allegiance *to the Flag* of the United States of America, *and to the Republic* for which it stands." 4 U.S.C. § 4 (2003) (emphasis added). What follows, then describes the history, character, and culture of the Republic to which the adherent just pledged his or her allegiance: "one Nation under God, indivisible, with liberty and justice for all." *Id.* Thus, one who voluntarily recites the Pledge does not affirm his or her belief in "God" or even his or her belief that the United States is and will be "one Nation under God," rather the adherent affirms his allegiance "to the Republic," which is then described as constituting a single indivisible nation, historically founded upon a belief and by those who believed in God, and for the purpose of promoting and securing liberty and justice for all. Such an affirmation is, no doubt, an exceptionally powerful statement of patriotism, but remains wholly secular, and hence consistent with the Establishment Clause, because the adherent is swearing his or her allegiance to this country and its primary symbol, not to any religion or Supreme Being.

Opinions of this Court and its Justices have reached exactly the same conclusion about the secular patriotic effect of pledging allegiance to the flag. Most notably, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court agreed that "the

language '[o]ne [N]ation under God,' as part of the Pledge of Allegiance," is one of numerous "examples of reference to our religious heritage," *id.* at 676, rather than any impermissible "profession of a religious belief," as the two-judge majority held below, *Newdow*, 328 F.3d at 487. For this reason, the decision below plainly erred in concluding that the voluntary recitation of the Pledge ran afoul of the Establishment Clause because the effect of the Pledge, while most certainly patriotic, is not to profess any belief in God or even to affirm that there is a God, but is to voluntarily, solemnly, and respectfully pledge allegiance to this country and its primary symbol—surely a secular and permissible constitutional goal.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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